No. SC 84336

IN THE SUPREME COURT OF MISSOURI

MISSOURI SOYBEAN ASSOCIATION, MISSOURI AG INDUSTRIES COUNCIL, INC., ASSOCIATED INDUSTRIES OF MISSOURI, and MISSOURI CHAMBER OF COMMERCE,

Appellants,

vs.

THE MISSOURI CLEAN WATER COMMISSION, TOM HERMAN in his capacity as Chairman of the Missouri Clean Water Commission, THE DEPARTMENT OF NATURAL RESOURCES FOR THE STATE OF MISSOURI, and STEPHEN M. MAHFOOD in his capacity as Director of the Missouri Department of Natural Resources,

Respondents.

APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY NO. CV198-1432CC – HONORABLE THOMAS J. BROWN III

SUBSTITUTE REPLY BRIEF FOR APPELLANTS

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Dated: July 22, 2002

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SUBSTITUTE REPLY BRIEF FOR APPELLANTS

SUMMARY OF ARGUMENT

As Appellants showed in their opening Brief, Respondents' promulgation of the 1998 Missouri 303(d) list was clearly a "rule" subject to judicial review under the Missouri Administrative Procedure Act ("MAPA"), § 536.050.1, R.S. Mo. The Missouri Clean Water Law itself requires that Respondents act only by rulemaking when "effectuating duties" imposed by the federal Clean Water Act, and the promulgation of the 303(d) list was undeniably meant to discharge an obligation imposed on the State by federal law. The 303(d) list also clearly satisfies the MAPA's own definition of a "rule", since it is generally applicable, implements and prescribes the State's water pollution control policy, and dramatically impacts the substantive and procedural rights of the Missouri public generally, and Appellants in particular. Notably, since Appellants filed their opening Brief Missouri has enacted amendments to the Clean Water Law, which confirm that 303(d) lists are "rules" under Missouri law.

Appellants also showed in their opening Brief that, even if it is not a "rule", the 303(d) list is clearly a "determination" of disputed issues, and is therefore subject to judicial review under the Clean Water Law in any event. *See* § 644.071, R.S. Mo.

Finally, Appellants' Opening Brief demonstrated that, considered on its merits, the 303(d) list is plainly invalid. It was promulgated in clear violation of the procedural requirements of both the MAPA and the Clean Water Law, and the inclusion of the Missouri and Mississippi Rivers on that list is arbitrary and capricious, since there is *absolutely no record evidence* supporting the listing, and, indeed, the listing of these waters is directly contrary to MDNR's technical assessment of these Rivers' water quality.

Respondents' primary response to these arguments is to deny responsibility. According to Respondents, they merely made "recommendations", or gave "advice", to EPA; they contend that EPA, and only EPA, actually took legally effective action concerning the Missouri and Mississippi Rivers. But Respondents' protestations ring hollow – in their 303(d) submission Respondents explicitly stated that the Missouri and Mississippi *were* part of Missouri's 303(d) list, *and* they acknowledged that TMDL development was legally required for *all* waters included on that list. Ironically, while EPA approved the Missouri list, it refused to itself consider the merits of the listing of the Missouri and Mississippi, instead deferring to Respondents' determination that listing those waters was justified. This Court should reject Respondents' attempt to play the "Who shot John?" game – Respondents are responsible for the listing which Appellants challenge, and cannot evade judicial review of their actions by passing the buck to the federal government.

Respondents' actions had dramatic effects on the Missouri public generally, and on Appellants in particular. Based on the 303(d) list, the State of Missouri is now duty-bound to spend untold millions of dollars to develop TMDLs for the Missouri and Mississippi Rivers, the largest waterbodies in the State. The 303(d) listing process is intended to insure that these expenditures only occur where they are technically justifiable and necessary for environmental protection; by making a mockery of that process, Respondents have denied all Missouri citizens the procedural protections the federal Clean Water Act affords. Further, the 303(d) listing *will* produce TMDLs, those TMDLs *will* result in further restrictions on discharges to these Rivers, and those restrictions *will* adversely affect Appellants' members (particularly given that the Appellant organizations essentially represent every conceivable category of property owner in the Missouri and Mississippi River watersheds).

Respondents claim that any decision by the Missouri state courts would be meaningless. According to Respondents, because of EPA's approval of the 303(d) list, the matter is now out of the State's hands – whether lawful or not, the listing of the Missouri and Mississippi has now developed a life of its own. But EPA did not itself decide that the Missouri and Mississippi were impaired by "pollutants" – it merely deferred to the State's determination. Indeed, EPA suggested that the State had listed those waters voluntarily, without regard to federal Clean Water Act standards. In these circumstances, a determination by Missouri's courts that the Respondents' listing decision is fundamentally, and fatally, flawed would result in the removal of the Missouri and Mississippi from the 303(d) list, and would prevent the unwarranted expenditures of Missouri tax dollars on unneeded TMDLs.

It is critical to recognize the upshot of accepting Respondents' arguments. If this case is dismissed, the lengthy, complex and expensive process of developing TMDLs for the Missouri and Mississippi Rivers will go forward, despite the fact: that *no agency*, State or federal, has considered comments challenging the listing of those waters, or has actually made a technical determination that those waters satisfy federal listing criteria; and that *no court* has reviewed the agency's listing decision on its merits. It is up to this Court to put a stop to this bureaucratic process run amok.

ARGUMENT

I. Respondents Promulgated an Administrative "Rule" Subject to Review under the Missouri Administrative Procedure Act.

A. The Missouri Clean Water Law Explicitly Requires that the Commission Act by Rulemaking Whenever it Performs Its Duties under Federal Pollution Control Laws.

As Appellants showed in their opening Brief (at 35-37), the Missouri Clean Water Law provides that the Commission "shall * * * adopt * * * rules and regulations to enforce, implement and effectuate the * * * duties * * * required of this state by any federal water pollution control act." § 644.026.1(8), R.S. Mo. Because Respondents were required to promulgate Missouri's 1998 303(d) list by the federal Clean Water Act, 33 U.S.C. § 1313(d)(1)(A), their promulgation of the list clearly "effectuate[d]" a "dut[y]" required of Missouri by a "federal water pollution control act." Accordingly, under § 644.026.1(8), the Commission was required to act by rule in establishing its 303(d) listing, and that list is reviewable as a "rule" under the MAPA.

Respondents reply that "this statute does not enlarge the definition of 'rule' in § 536.010(4)," and that "it is an unreasonable stretch to read the statute as treating the Commission's proposal * * * as an implementation of a federal legal requirement." Resp. Br. 19-20.

Respondents' arguments are unconvincing. First, § 644.026.1(8) clearly requires the Commission to act by rule, and only by rule, when "effectuat[ing] duties" imposed by the federal Clean Water Act. Even if such actions would not be considered "rules" if § 536.010(4) were considered in isolation, under the specific, and later-enacted language of § 644.026.1(8) these actions are required to be conducted by rulemaking. To the extent there is any tension between the MAPA's general definition of a "rule" and § 644.026.1(8), as the specific and later-enacted provision § 644.026.1(8) clearly controls.

Second, Respondents simply misstate the record in claiming that they were not "implementing a federal legal requirement" in promulgating the 1998 303(d) list. Resp. Br. 20. This argument by litigation counsel directly contradicts Respondents' own words at the outset of the 303(d) list itself:

> The following waters were adopted by the Missouri Clean Water Commission as the 1998 list of waters designated under section 303(d) of the federal Clean Water Act. *The federal Water Pollution Control Act, section 303(d), requires that each state identify those waters for which existing required pollution controls are not stringent enough to implement state water quality standards*. For these waters, states are required to establish total maximum daily loads (TMDLs) according to a priority ranking. The waters listed below are not expected to attain water quality standards through the implementation of any currently required pollution control technology.

L.F. 200 (emphasis added).

Thus, based on Respondents' own words, it is undeniable that Respondents were effectuating a duty imposed by federal law when they promulgated Missouri's 1998 303(d) list. Under § 644.026.1(8), that duty *had to be* performed by rulemaking; accordingly, it was error for the Circuit Court and the Court of Appeals to conclude that Respondents' actions were not a reviewable "rule".

B. A Recently Enacted Amendment to the Clean Water Law Confirms that Respondents' Promulgation of 303(d) Lists Constitutes Rulemaking.

On July 11, 2002, Governor Holden signed into law combined Senate Bills 984 & 985. *See* Appendix to this Brief. The bill amends the Missouri Clean Water Law by adding a new subsection to § 644.036, R.S. Mo. That new subsection provides:

> 5. Any listing required by Section 303(d) of the federal Clean Water Act, as amended, 33 U.S.C. 1251 et seq., to be sent to the U.S. Environmental Protection Agency for their approval that will result in any waters of this state being classified as

impaired shall be adopted by rule pursuant to chapter 536, RSMo [*i.e.*, the MAPA].

Total maximum daily loads shall not be required for any listed waters that subsequently are determined to meet water quality standards.

See Reply App. 25.

Under this legislation, the promulgation of Missouri's 303(d) list constitutes rulemaking. The legislation establishes that the Court of Appeals and the Circuit Court erred in holding that the 1998 303(d) list was not a "rule" subject to judicial review under § 536.050.1.

While courts must assume that the legislature intended to achieve something by amending a statute, "'it is also true that the purpose of a change in the statute can be clarification,'" rather than to change existing law. *Missouri Comm'n on Human Rights v. Red Dragon Rest., Inc.*, 991 S.W.2d 161, 167 (Mo. App. W.D. 1999), *quoting Mid-Am. Television Co. v. State Tax Comm'n*, 652 S.W.2d 674, 679 (Mo. banc 1983), *cert. denied*, 465 U.S. 1065 (1984); *accord, e.g., Flipps Nine, Inc. v. Missouri Prop. & Cas. Ins. Guar. Ass'n*, 941 S.W.2d 564, 568 (Mo. App. E.D. 1997).

Senate Bills 984 & 985 were clearly intended to clarify existing law, and this legislation therefore answers the question whether Missouri's 1998 303(d) list was a "rule". First, no one can seriously dispute that this legislation was a swift legislative response to the Court of Appeals' decision in this case. As at least two prior decisions recognize, in these circumstances new legislation should be viewed as clarifying, rather than altering, existing law. *See Andresen v. Board of Regents*, 58 S.W.3d 581, 589-90 (Mo. App. W.D. 2001) (statutory amendment specifying that state university employees not subject to general civil service laws was a clarification where it represented "the legislature's immediate reaction to the decisions in" two court cases reaching a contrary result); *Hogan*

v. Kansas City, 516 S.W.2d 805, 811 (Mo. App. W.D. 1974) ("In this case an intention to clarify the law, rather than necessarily to change the existing law, can reasonably be inferred as a response by the City Council to this very litigation which was pending at the time the 1966 amendment was adopted.").

In addition, the Court of Appeals' decision in this case explicitly invited the legislature to resolve a purported "dilemma" between the MAPA's rulemaking provisions and the Missouri Clean Water Law. Op. at 25, Appendix to Appellants' Opening Brief at A-025.[1] The legislature accepted the invitation. It acted swiftly and decisively to remove any conceivable confusion as to how the MAPA and the Clean Water Law interact, and to establish that the "dilemma" the Court of Appeals perceived never in fact existed. The fact that "[t]he legislature's amendment * * * resolves any conflict which may have existed between" the MAPA and the Clean Water Law provides a further ground to find Senate Bills 984 & 985 to be clarifying legislation. *Andresen*, 58 S.W.3d at 589.

C. Respondents' Promulgation of the 1998 303(d) List is a "Rule" under the MAPA's Generally Applicable Definition.

Respondents' Brief exhibits a fundamental misconception as to two critical points: (1) that it was Respondents, not EPA, who placed the entirety of the Mississippi and Missouri Rivers on the 1998 303(d) list; and (2) that once a water is placed on that list, the development of Total Maximum Daily Loads is *statutorily required*. *See, e.g.*, Resp. Br. 12 (suggesting that Respondents merely

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[1] Respondents acknowledge this. *See* Resp. Br. 25 ("The court [of appeals] merely held that it would be up to the legislature to provide an avenue for judicial review of a § 303(d) list * * *.").

made "recommendation[s] to a federal agency"); *id*. at 15 (listing constituted "a preliminary assessment," and was merely "advice and information offered to the EPA").

Despite Respondents' actual (or feigned) confusion on these points, it is undeniable that Respondents are responsible for the 303(d) listing of the Missouri and Mississippi Rivers, and the requirement that TMDLs now be developed for those waters. First, it cannot be disputed that the 1998 303(d) list submitted by Respondents listed the entire lengths of both the Missouri and Mississippi Rivers. *See* L.F. 200, 204. While Respondents listed these rivers in "Category 2" of the 1998 submission, they made clear, in their submission to EPA, that "Category 2" waters were part of the 303(d) list itself:

> Commenters have expressed concerns of two types regarding subdividing the list. One commenter was concerned that Category 2 and 3 waters really were not on the 303(d) list. Other commenters felt that the present uncertainty of the data supporting listing of Category 2 waters should have resulted in their exclusion from the list. *The department views all waters listed in any of these three categories as being on the 1998 section 303(d) list,* and also recognizes the importance of noting potential problems which presently have inadequate documentation. No changes were made in response to these comments.

L.F. 298 (emphasis added).

Second, although litigation counsel now acts as if the 303(d) list merely represented Respondents' musings as to waters deserving further analysis, Respondents themselves clearly stated in the 303(d) submission itself that they recognized that TMDL development was *mandatory* with respect to each and every water on the list:

> The federal Water Pollution Control Act, section 303(d), requires that each state identify those waters for which existing required pollution controls are not stringent enough to implement state water quality standards. For those waters, *states are required to establish total maximum daily loads (TMDLs)* according to a priority ranking. The waters listed below are not expected to attain water quality standards through the implementation of any currently required pollution control technology.

L.F. 200 (emphasis added). Respondents could hardly take any other position, since the Clean Water Act makes unambiguously clear that TMDLs are mandatory for all listed waters: "Each State *shall* establish for the waters identified * * * the total maximum daily load * * *. Such load *shall be established* at a level necessary to implement the applicable water quality standards * * *." 33 U.S.C. § 1313(d)(1)(C).

Ironically, although Respondents now claim they were merely "advising" EPA by providing their "recommendations", EPA itself refused to consider comments concerning supposed impairments on the Missouri and Mississippi Rivers, and actually suggested that the State had "voluntarily" listed these waters *even though they did not meet federal listing criteria*. *See* discussion in § III of this Brief, *infra*.[2]

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[2] In their effort to minimize their own role, and magnify EPA's, Respondents refer to EPA's obligation to make its own listing determinations, and develop its own TMDLs, in the event the State fails to do so. Resp. Br. 17. But those duties are irrelevant, because they were never triggered here. Respondents did, in fact, submit a list for the State of Missouri, and EPA's role was therefore limited to review and approval – this is not a case where EPA itself made the listing decisions.

Respondents ignore, and unduly minimize, the implications of their own actions when they claim, in essence, that the 303(d) listing was "no big deal." To the contrary, this list was the State's formal determination that certain Missouri waters were impaired by "pollutants"; upon EPA's approval (which was apparently granted without any independent technical review of the State's listing decisions), the listing has dramatic consequences – the State is now bound to develop TMDLs for "habitat loss," restricting the discharge of "habitat loss" into the Missouri and Mississippi Rivers. Moreover, by incorporating two massive waterbodies into the list with absolutely no technical justification, Respondents have rendered the 303(d) listing process meaningless, even though that process was intended to serve a "gatekeeping" function to avoid expenditures on unwarranted TMDL development. As an EPA advisory committee recognized:

> We recognize that the costs associated with implementing TMDLs may impact communities and businesses located along listed waters. If properly implemented, however, the TMDL program will improve the quality of waters listed pursuant to § 303(d)(1) and will benefit those communities and businesses, as well as the environment. *It is critical that § 303(d)(1) listing decisions be based on high quality, sound scientific information. If waters are now listed on the basis of inadequate data, however, TMDL development resources are being diverted from addressing clearly documented impairments.*

"Report of the Federal Advisory Committee on the Total Maximum Daily Load (TMDL) Program," at 10 (available at http://www.epa.gov/owow/tmdl/advisory.html) (emphasis added).

By making a mockery of this important analytical process, Respondents have denied Appellants, and all Missouri citizens, their procedural rights, and have guaranteed the expenditure of millions of Missouri tax dollars for the development of unnecessary TMDLs.

Further, the listing decision has also directly impacted, and will necessarily have further direct impacts, on Appellants and other private parties, as alleged in Appellants' Petition. *See* Opening Br. at 40-41. This is not "hyperbole" or "hysteria", as Respondents claim (Br. at 15-16) – TMDL development *will* occur for the listed waters; those (inevitable) TMDLs *will* result in restrictions on discharges to the listed waters beyond those presently required; and those (inevitable) heightened discharge restrictions *will* adversely affect the actions of Appellants, and their members, on their property – particularly since the membership of the Appellant organizations encompasses every conceivable type of user of property adjoining the Rivers.[3]

Respondents also argue that the 303(d) list is not a rule merely because it "proposes to expend [public] funds." Resp. Br. 21. But the 303(d) list is much more than a mere spending decision – it is a formal determination that particular waters satisfied specific factual criteria, triggering specific further regulatory action, at a cost of millions of dollars. This is far more than a decision, for example, to participate in funding a particular study program – by making this finding Respondents have bound themselves, and the State, to the development of a massive, costly, and complex regulatory program.

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[3] The Eighth Circuit's ruling in the action challenging EPA's approval of the Missouri list, Resp. Br. 15-16 n.25, is not relevant to the issues presented here. That case did not involve a challenge to *Respondents'* actions; nor did it involve the judicial review provisions of the MAPA and the Missouri Clean Water Law, which clearly provide for review of Respondents' "rules" and "determinations."

Respondents also argue that the listing is not a "rule" because "the Commission provided four notices soliciting comments about the list," and therefore the rights of the public were not impaired by promulgation of the list without following rulemaking procedures. Resp. Br. 22. What Respondents fail to mention, however, is that *none of the four public notices gave any indication that Respondents were proposing to add the Missouri and Mississippi Rivers to the 303(d) list* – indeed, one of those notices specifically advised that MDNR had determined that there was no basis for such a listing. (In MDNR's words: "The Missouri and Mississippi are not listed because there are no water quality contaminant violations" on those waters. L.F. 192-93.) On this record, it is laughable for Respondents to claim that the public had adequate notice of, and an opportunity to comment on, the decision to list the Missouri and Mississippi.

II. Even if the List is not a "Rule", it is a "Determination" Subject to Judicial Review under the Missouri Clean Water Law.

Respondents first argue that, although the issue was actually decided by the Court of Appeals, this Court may not consider whether the 303(d) list is a "determination" under § 644.071, R.S. Mo., because Appellants did not explicitly invoke the statute in the trial court.

But as Respondents acknowledge, the applicability of § 644.071 was briefed in the Court of Appeals, and the Court of Appeals actually addressed the issue, finding that, to the extent § 644.071's authorization of review of "final determinations" was broader than the MAPA's authorization of review of "rules," this was "a dilemma that must be resolved, if at all, by the legislature * * *." Op. at 25, App. at A-025.

This Court will review an issue actually decided by a lower court, even if the issue was raised by the lower court *sua sponte*. *See Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241, 246 (Mo. banc

1984) (considering issue raised and decided by trial court *sua sponte*, despite claim that issue was not properly raised by appellant's pleading).

On its merits, Respondents argue that the 303(d) list cannot be a "determination" because, in essence, it is not a final adjudication, and because Appellants did not seek judicial review under the MAPA's contested case procedures. *See* Resp. Br. 24 (assuming that a reviewable "determination" must be "an administrative action affecting a specific person's rights"). But as Appellants showed in their Opening Brief, the 303(d) list is a "determination" under the commonly understood meaning of the term, since it "settles a controversy," "resolves a [disputed] question," and "decides definitely and firmly regarding a course of action." Appellants Br. at 51 (quoting dictionary definitions). There is no requirement under any of these definitions that the "determination" settle the rights only of specified persons.

III. A Declaration by Missouri's Courts that the State's 1998 303(d) List is Invalid Would Provide Appellants with Meaningful Relief.

As Appellants showed in their opening Brief, on its merits Missouri's 1998 303(d) list must be vacated. The list was promulgated in clear violation of the procedural requirements of the MAPA and the Missouri Clean Water Law. Further, the Clean Water Commission's addition of the Missouri and Mississippi Rivers to the list has *absolutely no* evidentiary support in the record (and, in fact, is contrary to MDNR's publicly noticed technical assessment that there are *no* water quality violations on those Rivers).

Rather than respond to Appellants' arguments, Respondents take a different tack: they argue, essentially, that it simply doesn't matter whether Missouri acted lawfully or not.[4]

[4] While Respondents do not respond to Appellants' legal arguments concerning the

EPA did not separately consider the issue whether the water quality of the Missouri and Mississippi Rivers did or did not justify 303(d) listing; rather, EPA *refused to consider comments* challenging the improper inclusion of these waters, instead deferring to Missouri's determination of an impairment. Responding to comments by Appellants concerning the technically unsupported listing of the Missouri and Mississippi Rivers, EPA stated:

> EPA did not solicit comments on MDNR's inclusion of the Missouri and Mississippi Rivers in the Public Notice published February 2, 1999. EPA's Notice and Comment were limited to EPA's decision to add 15 waters to the MDNR List. Therefore, these comments are beyond the scope of EPA's February 2 notice.

L.F. 393.

Indeed, in its response to Appellant's comments, EPA suggested that it *had no authority* to review the listing of the Missouri and Mississippi, since, according to EPA, the listing of those waters may have been a "voluntary" decision by the State of Missouri to impose more stringent regulation than

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procedural and substantive flaws in the 303(d) listing, in their "Statement of Facts" Respondents claim that *the Commission* added the Missouri and Mississippi Rivers to the 303(d) list "on the basis of 'habitat loss' due to 'channelization,'" and after hearing public comments. Resp. Br. at 8. This statement of "fact" seriously misstates the record. The testimony of the senior MDNR employee responsible for development of the list was that there was *no* discussion of any "pollutant" justifying the listing of the Missouri and Mississippi at the Commission's September 23, 1998 meeting; rather, the identification of "habitat loss" as a pollutant was made by MDNR following the meeting, in a *post hoc* attempt to justify the Commission's vote to list these Rivers. L.F. 84-85.

the federal Clean Water Act requires. In specific response to Appellants' comments regarding the listing of the Missouri and Mississippi, EPA explained:

> [T]he State has the discretion under Section 303(d), which charges States with primary responsibility to identify [impaired waters] for TMDL development, and Section 510, which authorizes States to adopt more stringent pollution controls, to include waters on their Section 303(d) lists that may not be required to be included by current EPA regulations, and EPA's regulations do not compel the Agency to disapprove the State's list because of the inclusion of such waters. EPA guidance also recognizes that States may take a conservative, environmentally protective approach in identifying waters on their Section 303(d) lists.

L.F. 394.

In light of EPA's comment that the State may have listed the Missouri and Mississippi Rivers outside the requirements of the Clean Water Act, and outside of EPA's approval authority, Respondents' Brief has it exactly backwards when it claims that "[t]he EPA's list includes changes the Commission did not want and over which the Commission has no control." Resp. Br. 27. To the contrary, the list apparently included waters "over which EPA has no control."

In any event, EPA clearly did not make any independent determination concerning the status of the Missouri and Mississippi Rivers, but merely approved the State's designation of those waters. Yet Respondents now claim that further action by the State (through its courts) declaring the listing of these Rivers to be unlawful, would have no effect – "[t]he circuit court cannot undo what the EPA has done." Resp. Br. at 27. But this argument ignores the reality of what has occurred – *EPA has approved action taken by the State, not taken action itself*. If the action EPA approved is later found to

have violated state law, there is no indication that EPA would nevertheless insist on the development of TMDLs to address impairments which have not lawfully been identified. Notably, although it also addressed federally approved state action, the Court of Appeals in *Tonnar v. Missouri State Highway & Transp. Commission*, 640 S.W.2d 527 (Mo. App. W.D. 1982), had no trouble finding state action unlawful.

Further, Appellants have a legitimate concern that, if not addressed now, they may lose any further opportunity to challenge the State's 303(d) listing decision. As noted in Appellants' Opening Brief (at 15), under EPA's regulations it is not clear whether a water may be delisted on the ground that there was no technical justification for its initial listing – rather, the regulations refer to delisting "if *new data or information* indicate that the waterbody *is attaining and maintaining* the applicable water quality standards." 40 C.F.R. § 130.29(c) (emphasis added). The lack of data at the time of initial listing, or the lack of evidence of *non*attainment of water quality standards, do not appear to fall within the delisting criteria. Therefore, unless Appellants' substantial challenges to the listing decision are reviewed now, they may be foreclosed.

CONCLUSION

For the foregoing reasons, and for the reasons states in their opening Brief, Appellants respectfully request that this Court reverse the trial court's dismissal of Appellants' action, and enter an Order directing that, on remand, the Circuit Court declare Missouri's 1998 303(d) list invalid and of no further force or effect.

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Dated: July 22, 2002

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this Substitute Reply Brief for Appellants, as well as a copy of the brief on diskette, were served by First-Class, U.S. Mail, this 22nd day of July, 2002, on the following:

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CERTIFICATE OF COMPLIANCE
REQUIRED BY SUPREME COURT RULE 84.06(c)

The undersigned hereby certifies the following:

1. I am an attorney practicing law with the law firm of Lathrop & Gage L.C., 2345 Grand Boulevard, Kansas City, Missouri 64108-2684. My telephone number is (816) 292-2000. My Missouri Bar Number is indicated below.

2. I am one of the attorneys submitting the foregoing Substitute Reply Brief for Appellants.

3. I hereby certify that the foregoing Brief complies with the limitations contained in Supreme Court Rule 84.06(b). Based on the word-counting feature of the WordPerfect software used to prepare this Brief, the Brief contains 4,914 words.

4. I have filed a copy of the foregoing Brief with the Court on diskette, and have served a copy of that diskette on each adverse party. I hereby certify that the diskettes have been scanned for virus and that the diskettes are virus-free.

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